FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 830

MONTGOMERY WARD AND COMPANY, *Petitioner*,

v.

LUTHER M. DUNCAN, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

J. MERRICK MOORE,
Little Rock, Arkansas.

L. E. OLIPHANT,
Chicago, Illinois.

Counsel for Petitioner.

DEMOCRAT P. & L. CO., LITTLE ROCK

INDEX

Cases Cited

Rules Cited

Text Books

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No._____

MONTGOMERY WARD AND COMPANY ..... *Petitioner,*

v.

LUTHER M. DUNCAN ..... *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On August 31, 1938, the respondent, Luther M. Duncan, instituted this suit in the Circuit Court of Pulaski County, Arkansas, against the petitioner, (original Com-

plaint, R. 1), alleging that on July 3, 1938, he was in the employ of the petitioner as a truck driver and that one Jake Jackson was at the time an employee of the petitioner and working as a helper on the truck operated by the respondent. That the respondent and Jake Jackson were instructed by the petitioner to deliver an ice box to a customer at Greenbrier, Arkansas. That while respondent and the said Jake Jackson were in the act of unloading the ice box the respondent received the injuries complained of and more specifically hereinafter enumerated in referring to respondent's amendment to his complaint. That as a result of the injuries sustained by him he was totally incapacitated from performing any sort of work from the date of such injuries and has suffered excruciating physical pain and mental anguish. There was a prayer for recovery of $45,000, with costs.

On September 16, 1938, this cause was removed to the United States District Court for the Eastern District of Arkansas, Western Division, and on October 6, 1938, petitioner filed its answer (R. 3), specifically denying the foregoing allegations of respondent's complaint and further pleaded that the respondent and Jake Jackson, at the times mentioned in respondent's complaint, were in the employ of one E. L. Santee, who, during the times mentioned in respondent's complaint, was under contract with the petitioner to make deliveries of merchandise sold by the petitioner to its customers in the Little Rock territory.

On February 10, 1939, respondent filed an amendment to his complaint (R. 5), in which he described the injuries sustained by him in greater detail, and in addition alleged that the negligence of the petitioner consisted in the fol-

lowing state of facts: That the ice box described in the complaint had been transported in and was being unloaded from a covered truck or van, the end gate of which could be lowered to a horizontal position on a level with the floor of the bed of the truck; that the floor of the truck bed and the end gate, when lowered, were slightly higher than the porch floor to which said box was being lowered by respondent and his co-worker (Jake Jackson); that because of the excessive weight of the box and because of the position in which respondent was placed in stepping down, backwards, from the truck to the porch floor, caution on the part of his co-worker was necessary and was usual and customary and had been exercised on previous like occasions and was reasonably expected by respondent on this occasion, to prevent injury to respondent by throwing an excessive load or weight upon him; that about the time respondent stepped backwards from the truck floor to the porch, bearing the weight of one side of said box, his co-worker, having cleared the top or cover of said truck bed, unexpectedly, carelessly and negligently straightened up and raised his side of the box, at a time when he should have kept the same lowered and on a level with that of respondent, and thus threw practically the entire weight of the box on the respondent at a time when respondent was in a hazardous position and unable to stand such weight or strain; that it was as a result of such negligence on the part of his co-worker that the respondent received the injuries complained of.

On February 16, 1939, the petitioner filed an answer (R. 7), to the foregoing amendment to complaint in which it pleaded, first, that the respondent and respondent's

co-worker, Jake Jackson, were in fact employees of E. L. Santee, an independent contractor, and not employees of the petitioner; second, that if the respondent received the injuries complained of, such injuries were caused or contributed to by his own negligence; and, third, assumption of risk on the part of the respondent.

The trial was begun before a jury on February 16, 1939; a verdict was rendered by the jury on behalf of the respondent on February 18, 1939, in the sum of $16,500; and on the same date the court entered judgment on said verdict against the petitioner in the sum of $16,500, with costs (R. 96).

No person, other than the respondent and his co-worker, Jake Jackson, witnessed the accident. The testimony of the respondent and Jake Jackson was in sharp conflict, so that respondent's own testimony with reference to the circumstances of the accident embraces all of the testimony upon which this element of his case rests. Respondent's testimony with reference to the circumstances of the accident was as follows:

That on the morning of the 27th of June, 1938, respondent and his co-worker, Jake Jackson, were directed by Mr. Smothers, shipping clerk at petitioner's Little Rock, Arkansas, store to deliver an ice box to the store of J. O. Cantrell, a merchant at Greenbrier, Arkansas. That the truck was driven by the respondent and Jake Jackson was his helper. That the truck used by them had a van body on it and an end gate at the back of it which could be let down level with the floor of the truck bed (R. 35). That when they reached the Cantrell store they backed the truck up to the rear of the store against the unloading platform,

with the end gate of the truck overlapping the platform. That the end gate and floor of the truck were ten or twelve inches higher than the porch or unloading platform (R. 35). That after backing the truck up against the porch or unloading platform, respondent and Jackson went into the van or truck and got the ice box and when they reached down to lift it respondent said "all right." That they would always give signals because the box was between them (R. 35). That they edged the box back to the end gate and respondent hollered "Hold it, Jake, take it easy; I am stepping down"; and as respondent stepped down Jake Jackson raised his side of the box a little bit and threw a little weight on the respondent, and the respondent went down as he was stepping down. That Jake Jackson tilted the box over toward him; that the box did not fall on the respondent; that the respondent hollered, "Set it down, Jake." That he, respondent, was going down and hollered to him (Jackson) to let the box down. That respondent told Jackson that he had hurt his back and couldn't do any more (R. 36). That there was no one else out there at the time. That there wasn't much said about the accident except that respondent told Jackson that he hurt his back. That respondent didn't know at the time that he was as seriously hurt as he was. That some other people helped Jackson put the box in the store. That respondent drove the truck back to town. That his back was still hurting him when he got back to town (R. 36). That he tried to work the next day but was suffering so from his back that he had to give it up and go home, and that the next day he went to the hospital (R. 37).

At the conclusion of respondent's case the petitioner moved the court for a directed verdict (R. 58), on the following grounds:

> "First: The evidence introduced by plaintiff is insufficient to make a *prima facie* case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.
>
> "Seccnd: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient to support any verdict that might be rendered the plaintiff against the defendant.
>
> "Third: The evidence shows as a matter of law that the injury sustained by plaintiff on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and obvious and known to and appreciated by him, and assumed by him as a part of his employment.
>
> "Fourth: The evidence shows that the plaintiff was a fellow servant of Jake Jackson, that both were the employees of E. L. Santee, and E. L. Santee was an independent contractor under the contract in force between E. L. Santee and Montgomery Ward and Company, providing for E. L. Santee furnishing a driver and helper to make all deliveries for Montgomery Ward and Company."

The trial court overruled petitioner's motion for a directed verdict; whereupon, petitioner offered evidence in its own behalf, at the close of which it renewed its motion for a directed verdict (R. 88), on the following grounds:

> "First: The evidence introduced by plaintiff is insufficient to make a *prima facie* case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.
>
> "Second: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient

to support any verdict that might be rendered the plaintiff against the defendant.

"Third: The evidence shows as a matter of law that the injury sustained by plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and obvious and known to and appreciated by him, and assumed by him as a part of his employment.

"Fourth: The evidence shows that the plaintiff was a fellow servant of Jake Jackson; that both were the employees of E. L. Santee and further shows that E. L. Santee was an independent contractor insofar as the plaintiff and his relations to the defendant was concerned.

"Fifth: That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured, that he was injured by any negligent act or acts on the part of Jake Jackson.

"Sixth: That the evidence shows that the plaintiff was himself guilty of negligence in the manner in which he attempted to unload the ice box from the truck to the loading platform, and that if there was any negligence on the part of the helper, Jake Jackson, that the plaintiff was guilty of such contributory negligence in the case, as in the event of recovery would diminish his recovery in proportion to what his contributory negligence contributed to his injury."

The renewed motion was likewise overruled, and the cause was submitted to the jury under instructions of the court, with the result that, as above stated, on February 18, 1939, the jury returned a verdict on behalf of the respondent against the petitioner, and fixed his damages in the sum of $16,500. The court entered judgment on the verdict on the same date (R. 96).

On February 25, 1939, petitioner filed its motion for a judgment *non obstante veredicto* and joined this motion with a motion for a new trial in the alternative, as provided for by Rule 50 (b) of the Federal Rules of Civil Procedure, which became effective September 13, 1938, which motion was as follows (R. 97):

> "Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:
>
> "A. Grounds for Motion to set aside verdict of the jury and the judgment rendered and entered thereon and to enter judgment for the defendant notwithstanding the verdict:
>
> "1. That the verdict is contrary to the law.
>
> "2. That the verdict is contrary to the evidence.
>
> "3. That the verdict is contrary to the law and evidence.
>
> "4. That the evidence introduced by the plaintiff was insufficient to make a *prima facie* case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.
>
> "5. That the evidence considered in its most favorable light on behalf of the plaintiff was insufficient to support any verdict that might be rendered the plaintiff against the defendant.
>
> "6. That the evidence shows as a matter of law that the injury sustained by the plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which were open and obvious and known to and appreciated by him and assumed by him as a part of his employment.

"7. That the evidence shows that the plaintiff was a fellow servant of Jake Jackson; that both were the employees of E. L. Santee; and further shows that E. L. Santee was an independent contractor insofar as the plaintiff and his relations to the defendant were concerned.

"8. That the defendant has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured that he was injured by any negligent act or acts on the part of Jake Jackson.

"9. The Court erred in refusing to grant defendant's request for a directed verdict.

"B. Grounds for motion for a new trial:

"(NOTE: Here follow specifications numbered '1' to '8,' inclusive, which are identical with specifications numbered '1' to '8' under Section 'A,' above, which, for the sake of brevity, are not here repeated).

"9. That the damages found by the jury and the verdict based thereon were excessive.

"10. That it was error for the court to permit Dr. Mahlon D. Ogden, a witness for the plaintiff, to answer a certain hypothetical question propounded by plaintiff's counsel, as amended by plaintiff's counsel, after objection by defendant's counsel, over the objections of the defendant, which hypothetical question, defendant's objection thereto, plaintiff's amendment of such question, the court's ruling thereon, and the answer of the witness to said question are as follows:

"(NOTE: Here follows the hypothetical question propounded to the witness by Mr. Coulter, the objection of Mr. Chowning, the ruling of the court, the amendment by Mr. Coulter, and the answer of the witness, as the same appear at pages 56 to 58 of the record, all of which, for the sake of brevity, is not here repeated).

"11. The court erred in refusing to grant defendant's request for a directed verdict.

"WHEREFORE, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the defendant; and defendant further prays in the alternative that in the event the court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the court set aside said verdict and judgment on behalf of the plaintiff and grant the defendant a new trial herein."

On February 27, 1939, petitioner filed an amendment to the foregoing motion, which amendment was as follows (R. 100):

"Comes the defendant, Montgomery Ward & Company, and amends its motion heretofore filed herein entitled 'Motion to Set Aside Verdict of Jury and the Judgment Rendered and Entered Thereon and to Enter Judgment for the Defendant Notwithstanding the Verdict, and Motion for a New Trial,' in the following particulars:

"That sub-paragraphs numbered 8 of paragraph A. and B., respectively, of said motion are hereby amended so that each of said sub-paragraphs shall read as follows:

"'8. That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured that he was injured by any negligent act on the part of Jake Jackson.'

"That in addition to the grounds stated in said motion as a basis for a new trial herein, the defendant

adds the following additional errors as grounds for a new trial, and does hereby amend paragraph B. of the aforesaid motion by adding thereto sub-paragraphs 12, 13 and 14, as follows:

"12. The court erred in refusing defendant's requested instruction No. 4.

"13. The court erred in refusing defendant's requested instruction No. 9.

"14. The court erred in modifying defendant's requested instruction No. 9, and in giving said instruction No. 9 as modified, over the objection of the defendant.

"WHEREFORE, (Here follows a prayer identical with the prayer of the foregoing original motion, which prayer, for the sake of brevity, is not here repeated)."

On March 29, 1939, the trial court filed a written opinion, (R. 101) reciting that the verdict of the jury and judgment thereon should be set aside and petitioner's motion for judgment notwithstanding the verdict granted, and on April 17, 1939, the court entered an order setting aside the verdict of the jury and the judgment entered thereon and entering a judgment for the petitioner (R. 107).

The following excerpts from the opinion of the trial court sufficiently show the trial court's reasons for granting petitioner's motion for a judgment *non obstante veredicto*, namely:

"Giving the testimony its most probative effect and force, I do not think it is sufficient to sustain a verdict for the plaintiff in this case" (R. 105).

"* * * there is no evidence to show that the raising of this box, if any, was due to negligence on the part of Jake Jackson" (R. 105).

On April 21, 1939, respondent filed a motion requesting the trial court to pass on petitioner's motion for a new trial "to the end that only one appeal might be necessary" (R. 108); and on the same date, that is, April 21, 1939, the trial court entered an order overruling said motion (R. 111).

Thereafter the respondent perfected his appeal to the United States Circuit Court of Appeals for the Eighth Circuit, specifying the following alleged errors as grounds for appeal (R. 113):

"1. The trial court erred in granting the motion of defendant for a judgment notwithstanding the verdict, and in setting aside the verdict of the jury and the judgment rendered and entered pursuant thereto, and in rendering and causing to be entered a judgment in favor of defendant notwithstanding the verdict, on the erroneous grounds and hypotheses that the motions therefor were sufficient, that he had the power, after the expiration of ten days, to grant such relief on a ground not asserted in the motions for a directed verdict, that the evidence was not sufficient to support the verdict, that there was no actionable negligence on the part of plaintiff's fellow servant, and that plaintiff assumed the risk of the danger as a result of which he was injured.

"2. The trial court erred in finding and concluding that plaintiff assumed the risk of the danger as a result of which he was injured.

"3. The trial court erred in finding and concluding that the evidence failed to show any actionable negligence on the part of plaintiff's fellow servant, Jake Jackson.

"4. The trial court erred in finding and concluding that the evidence was insufficient to support the verdict of the jury and the judgment entered thereon.

"5. The trial court erred in depriving plaintiff of his constitutional right to a trial of the issues of fact in this cause by a jury.

"6. The trial court abused his discretion and erred in denying the motion of plaintiff and in refusing to specify the grounds on which he granted to defendant the relief sought.

"7. The trial court erred in overruling the motion of plaintiff for an order passing on defendant's motion for a new trial.

"8. The trial court erred in overruling the motion of plaintiff to strike paragraphs numbered '1,' '2,' and '3' of defendant's amendment to its answer, and in permitting defendant, on the day of the trial, to interpose an amendment raising new issues and defenses."

On January 23, 1940, the United States Circuit Court of Appeals for the Eighth Circuit entered an order and judgment reversing the order and judgment appealed from and directed the trial court to reinstate the verdict of the jury and the judgment entered thereon (R. 135). The reasons assigned by the Circuit Court of Appeals for the reversal of the case and for its direction to the trial court to reinstate the verdict and the judgment entered thereon are indicated by the following quotations from the court's opinion:

(1) "There was substantial evidence to warrant the jury in finding that the injury was the direct result of the sudden and unexpected 'tilting' of the ice box in disobedience to the signal given by plaintiff" (R. 133). In other words, that there was substantial evidence to sustain the verdict of the jury.

(2) That strictly speaking, petitioner's motion filed in accordance with Rule 50 (b) of the Federal Rules of

Civil Procedure, "did not pray for relief in the 'alternative,' giving the court a choice between two propositions, either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only 'in the event' he 'refuses to set aside the verdict * * * and judgment * * *. and refuses to enter judgment herein in favor of the defendant * * *'." (R. 135).

(3) That "the order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial, and the latter motion passed out of the case upon the entry of the order" (R. 135). The opinion of the Circuit Court of Appeals will be found on pages 128-135 of the record, but has not yet been reported.

A petition for rehearing was duly filed by your petitioner with the Circuit Court of Appeals, was entertained and was denied by an order entered on the 12th day of February, 1940 (R. 147).

II

REASON RELIED ON FOR ALLOWANCE OF THE WRIT

Rule 50 (b) of the Federal Rules of Civil Procedure provides as follows:

> "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. * * * A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative."

At the close of respondent's evidence petitioner moved for a directed verdict. This motion was denied. Thereafter

petitioner presented its evidence, and at the close of all the evidence again moved for a directed verdict. Again the motion was denied, and petitioner, within ten days after the reception of the verdict, filed its motion that the verdict and judgment entered thereon be set aside and that judgment be entered in accordance with its motion for directed verdict. With this motion was joined, in accordance with Rule 50 (b), a motion for new trial in the alternative. The trial court granted the motion for judgment *non obstante veredicto*, and having granted it, declined to pass upon the motion for new trial.

The Circuit Court of Appeals has found that there was substantial evidence to support the issues tendered by the respondent, that it would accordingly have been error for the trial court to have granted petitioner's motion for a directed verdict, and that the trial court therefore erred in granting the motion for judgment *non obstante veredicto*. But the Circuit Court of Appeals in its opinion and order goes farther than a mere reversal of the order of the trial court granting the motion for judgment *non obstante veredicto*. Instead of directing the trial court to reinstate the verdict and judgment and to then pass upon the motion for new trial, the Circuit Court of Appeals holds that the granting by the trial court of respondent's motion for judgment *non obstante veredicto* was "equivalent to a denial of the motion for new trial; and the latter motion passed out of the case upon the entry of the order." In other words, the effect of the decision and order of the Circuit Court of Appeals is that the verdict and judgment against petitioner is to be reinstated and that the trial court is to be denied the opportunity to pass upon petitioner's motion for new trial. The verdict and judgment against petitioner thus became final.

The result of the decision of the Circuit Court of Appeals is that where a party in accordance with Rule 50 (b) files a motion to have a verdict against him and judgment entered thereon set aside and to have judgment entered in accordance with his motion for directed verdict, and couples therewith, as permitted by the rule, a motion praying in the alternative for new trial, the action of the trial court in sustaining the motion for judgment *non obstante veredicto* is equivalent to a denial of the motion for new trial, notwithstanding the trial court did not see fit to pass upon the latter motion; and that the latter motion passes out of the case upon the entry of the order. If the ruling of the Circuit Court of Appeals is allowed to stand, one who takes advantage of the rule and couples a motion for new trial in the alternative with a motion for judgment *non obstante veredicto* runs the risk of forfeiting all opportunity to have his motion for new trial passed upon in case the trial court grants the motion for judgment *non obstante veredicto* and its order granting that motion is thereafter reversed and the case remanded. The ruling of the Circuit Court of Appeals constitutes the first judicial construction of Rule 50 (b) that we have been able to find upon this point, and the ruling comes as a surprise to many members of the bar.

The decision of the Circuit Court of Appeals on this point of procedure places an interpretation upon one of the most important of the new rules of civil procedure, and one, which, because it is applicable to jury trials in every Federal District Court, is apt to arise with great frequency. In making such ruling the Circuit Court of Appeals has therefore decided an important question of Federal procedural law which has not been but should be settled by this

Court at an early date. The case falls within the categories listed in Section 5 (b) of Rule 38 of the rules of this Court, and the writ prayed for should be allowed.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11536 Civil—Luther M. Duncan, Appellant, vs. Montgomery Ward & Company, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed, and for such further relief as to this Court may seem proper.

Dated March 11, 1940.

J. MERRICK MOORE,
Little Rock, Arkansas;

L. E. OLIPHANT,
Chicago, Illinois,

Counsel for Petitioner.

SUPPORTING BRIEF

I

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, (R. 101-106), is reported in 27 Fed. Supp. at page 4. The opinion of the Circuit Court of Appeals appears in the record at pages 128 to 135, but has not yet been published.

II

JURISDICTION

(1) The date of the judgment and order to be reviewed is January 23, 1940 (R. 135). The petition for rehearing was denied by the Circuit Court of Appeals on February 12, 1940 (R. 147).

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Sec. 240, and amendments, including the Act of February 13, 1925, Chapter 229, Section 1; 43 Stat., 938; U. S. C., Title 28, Section 347.

(3) The nature of the case has been stated in the foregoing petition. As stated therein, the case resulted in a final judgment and decree in the Circuit Court of Appeals, which appears in the record at pages 135, 136.

(4) Since this Court, under the statutory provisions referred to above, has jurisdiction to review on certiorari the judgment of a Circuit Court of Appeals in any case, we regard it as unnecessary at this point to cite cases believed to sustain the jurisdiction. However, in this con-

nection, we refer to the cases that will be hereafter cited and discussed in the Argument.

III

STATEMENT OF THE CASE

The case has already been stated in the preceding petition under Section I, beginning at page 1. The statement therein set forth is hereby adopted and made a part of this brief.

IV

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that the order of the District Court sustaining the motion for a judgment notwithstanding the verdict was equivalent to a denial of the motion for new trial and that the latter motion passed out of the case upon the entry of the order. The decision of the Circuit Court of Appeals upon this point places an interpretation upon Rule 50 (b) of the new Rules of Civil Procedure. The Circuit Court of Appeals has, therefore, decided an important question of Federal procedural law which is likely to arise in Federal District Courts with great frequency. The question is one which has not been but which should be settled by this Court.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals erred in holding that the order of the District Court sustaining the motion for a judgment notwithstanding the verdict was equivalent to a denial of the motion for new trial and that the latter motion passed out of the case upon the entry of the order. The decision of the Circuit Court of Appeals upon this point

places an interpretation upon Rule 50 (b) of the new Rules of Civil Procedure. The Circuit Court of Appeals has, therefore, decided an important question of Federal procedural law which is likely to arise in Federal District Courts with great frequency. The question is one which has not been but which should be settled by this Court.

ARGUMENT

The Circuit Court of Appeals, in holding that petitioner's motion for a new trial passed out of the case when the trial court granted the motion for judgment notwithstanding the verdict under Rule 50 (b), overlooked the purpose of the rule itself in allowing the joinder of a motion for new trial in the alternative. Rule 50 (b), after providing that a party who has moved for a directed verdict may, after the reception of a verdict of a jury, move to have the verdict and judgment entered thereon set aside and judgment entered in accordance with his previous motion for a directed verdict, provides further that a motion for new trial may be joined therewith or a new trial may be prayed for in the alternative. The new trial here referred to is obviously that provided for in Rule 59 of the Rules of Civil Procedure, which provides that a new trial may be granted in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Federal Court.

The purpose of Rule 50 (b) is accordingly to permit a motion for new trial as provided in Rule 59 to be joined and prayed in the alternative with the motion for judgment *non obstante veredicto*. It has generally been supposed, in the light of the announced purpose of the new

rules to simplify procedure, that the purpose of Rule 50 (b) is to permit the motion to be prayed alternatively, thereby making it unnecessary to file the motion provided for in Rule 59 separately; and it has not been thought (as shown by the quotation hereinafter set forth from Simpkins on Federal Procedure) that it was intended to impose the risk upon a party of having it held that his motion for new trial has passed out of the case in the event the motion to set aside the verdict and judgment thereon is sustained by the trial court and the order is thereafter reversed by the appellate court. Such a result seems hardly within the spirit of the rules.

(1)

In the beginning we comment briefly upon the court's statement in its opinion that "strictly speaking the motion did not pray for relief in the 'alternative,' giving the court a choice between two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for new trial 'in the event' he 'refuses to set aside the verdict * * * and judgment * * * and refuses to enter judgment herein in favor of the defendant.'"

We cannot agree with the court's interpretation of the prayer. The rule permits a motion for new trial in the alternative, and the fact that a new trial was prayed in the event the court should refuse to set aside the verdict and judgment and to enter judgment in favor of the movant in no way keeps the prayer from being in the alternative. According to customary procedure, the trial court would pass on the prayer that it set aside the verdict and judgment thereon and render judgment in favor of the defendant before it would reach the motion for a new trial. The

motion to set aside the verdict and for judgment in defendant's favor would be entertained before the motion for a new trial, and if the former motion were granted there would be no reason to entertain or consider the latter.

Petitioner's prayer, therefore, in asking the court to rule on the motion for a new trial in the event it should refuse to set aside the verdict and judgment, and to enter judgment in favor of petitioner, merely followed the usual course of judicial procedure, and surely can not be said for that reason not to have asked for relief in the alternative. Any other view seems to us to introduce into procedural questions the very spirit of over-refinement that it is the avowed purpose of the new rules to abolish.

(2)

Coming now to the ruling of the Circuit Court of Appeals that the order sustaining the motion for a judgment notwithstanding the verdict was equivalent to a denial of the motion for new trial and that the latter motion passed out of the case upon the entry of the order, we respectfully submit that it seems at utter variance with the rule. It has not been understood that Rule 50.(b), in giving the privilege of joining in the alternative, intended to eliminate from the case the motion for new trial in the event the motion for judgment *non obstante veredicto* is granted by the trial court and the order later reversed by the appellate court. The ruling of the Circuit Court of Appeals, if sustained, serves to entrap rather than to simplify procedure.

What has just been said is all the more apparent when it is remembered that the trial court, when passing upon a

motion for new trial, is governed by wholly different considerations than those which apply when the court is considering a motion for judgment notwithstanding the verdict. In the latter case the question before the court is the same as when it is asked in the first instance to direct a verdict. If there is substantial evidence in support of the issues tendered by the plaintiff, the case must be submitted to the jury, as held by the Circuit Court of Appeals in this case; and in the event of a verdict the trial court has no power to set it, and the judgment rendered thereon, aside and enter judgment in favor of the other party. The question is not one of preponderance of the evidence, but only whether there is substantial evidence to support the verdict.

But in passing upon a motion for new trial the trial court is not bound to sustain the verdict merely because there may be substantial evidence to support it. On the contrary, it is the *duty* of the trial court to set the verdict aside and grant a new trial if in its opinion the verdict is against the preponderance of the evidence.

The rule has been settled in Arkansas by repeated decisions, the Supreme Court of Arkansas saying in the case of *Bean* v. *Coffee,* 169 Ark. 1052 (277 S. W. 522), at page 1054:

> "The duty of the trial court, when it is believed and found that the verdict returned is contrary to the preponderance of the evidence, was thoroughly considered by us in the case of *Twist* v. *Mullinix,* 126 Ark. 427, and we need not repeat here what we there said. A syllabus in that case reads as follows: 'Where the trial court finds positively and unequivocally that the verdict of the jury is against the preponderance of the evidence, it is reversible error for him thereafter to

fail to set aside the verdict.' See also *Spadra Creek Coal Co.* v. *Callahan*, 129 Ark. 448; *Spadra Creek Coal Co.* v. *Harger*, 130 Ark. 374; *Mueller* v. *Coffman*, 132 Ark. 45; *Wilhelm* v. *Collison*, 133 Ark. 166; *Pettit* v. *Anderson*, 147 Ark. 468."

Presumably the Federal Courts will, in accordance with the Conformity Act, upon such questions follow the State Court (*Lyon* v. *Mutual Benefit Assn.*, 305 U. S. 484, 490), and moreover, the rule as settled by the Arkansas decisions is, as we understand it, the rule in the Federal Courts. *Ætna Cas. & Surety Co.* v. *Reliable Auto & Tire Co.*, 58 Fed. (2d) 100; *Railroad Co.* v. *Reeder*, 211 Fed. 280; *U. S.* v. *Flippence*, 72 Fed. (2d) 611.

In connection with the cases just cited it must be remembered that the Circuit Court of Appeals did not find that the preponderance of the evidence sustained the issues tendered by respondent. On the contrary, the court followed the rule applicable in the case of a motion for directed verdict, saying "on a motion for a directed verdict the evidence must be considered in its most favorable light on behalf of the plaintiff, and if there is substantial evidence in support of the issues tendered by the plaintiff they must be submitted to the jury" (R. 132); and the court found "there was substantial evidence to warrant the jury in finding that the injury was the direct result of the sudden and unexpected 'tilting' of the ice box in disobedience to the signals given by plaintiff" (R. 133). The court expressed no opinion as to where the preponderance of the evidence lay.

But the trial court was of the opinion and found "positively and unequivocally" that on the issue of negligence the preponderance of the evidence was in favor of pe-

titioner and against respondent, the trial court saying in its opinion:

> "Giving the testimony its most probative effect and force, I do not think it is sufficient to sustain a verdict for the plaintiff in this case" (R. 105).

> "* * * there is no evidence to show that the raising of this box, if any, was due to negligence on the part of Jake Jackson" (R. 105).

Having found that the verdict was against the preponderance of the evidence, and petitioner having so alleged as one of the assignments in its motion for new trial (R. 97-98-99), it would be the duty of the trial court under the applicable Arkansas decisions, when called to pass upon the motion for new trial, to set aside the verdict and the judgment and grant a new trial; and a refusal to do so would constitute reversible error. Under such circumstances petitioner was entitled in the event the trial court should refuse to grant the motion for a judgment *non obstante veredicto,* to have the court pass upon the motion for new trial and grant it. The trial court, however, took the view that, having granted the motion for judgment *non obstante veredicto,* it was unnecessary for the time being to pass upon the motion for new trial. We are unable to understand by what process of reasoning it can be said that Rule 50 (b), under such circumstances, is intended to penalize petitioner by forfeiting its opportunity to have the trial court pass upon the motion for new trial now that the appellate court has reversed the order sustaining the motion for a judgment *non obstante veredicto.*

It is said in the opinion of the Circuit Court of Appeals (a) that "the order sustaining the motion for a judg-

ment notwithstanding the verdict was equivalent to a denial of the motion for a new trial," and (b) "that the latter motion passed out of the case upon the entry of the order." With these statements we cannot agree.

(a) The passing upon the motion for new trial, had it been necessary for the trial court to entertain it, would have involved, as pointed out, wholly different questions as to the quantum and sufficiency of the evidence from those that were presented by the motion for a judgment notwithstanding the verdict. The motion for new trial should be granted if in the trial court's opinion the verdict was against the preponderance of the evidence; whereas, upon motion for judgment notwithstanding the verdict the only question presented to the court is whether there is any substantial evidence to support the verdict. Moreover, the motion for new trial as abstracted on pages 97, 98 and 99 of the record contained assignments of error that were not included in the motion for judgment notwithstanding the verdict, error being assigned, for example, to the action of the trial court in permitting the introduction of certain evidence over the objection of petitioner's counsel.

Again, as conceded by the Circuit Court of Appeals in its opinion, "the condition on which the (trial) court was asked to grant a new trial did not come into existence." This statement is true but the reason of its truth is that the trial court passed on and granted the motion for judgment notwithstanding the verdict. Only in the event that motion was denied was there any necessity of passing upon the motion for new trial. Accordingly, it is difficult to understand how the order sustaining the motion for judgment notwithstanding the verdict was in the least equiva-

lent to a denial of the motion for a new trial. When the trial court sustained the motion for a judgment notwithstanding the verdict it became unnecessary either to grant or deny the motion for a new trial, and the trial court will not be deemed to have done a useless thing.

(b) Nor can we agree that upon the entry of the order sustaining the motion for judgment notwithstanding the verdict the motion for new trial passed out of the case. That motion was not acted upon because of the action of the trial court in sustaining the motion for judgment notwithstanding the verdict, but it does not follow that it passed out of the case. If the trial court had denied the motion *non obstante veredicto* the motion for new trial would have remained for disposition. Now that the action of the trial court in granting the motion *non obstante veredicto* has been reversed why does not the motion for new trial still remain? In this connection, we quote the statement of Mr. Simpkins, appearing in his new work on Federal Procedure, 3rd Edition, page 514, Section 702, where in discussing under Rule 50 (b) the question here presented, he says:

> "If the motion for judgment *non obstante veredicto* is granted, what happens to the motion for a new trial? If left undisposed of, by the trial court, the appellate court, if it reverses the judgment *non obstante veredicto,* can only remand with directions to pass on the motion for a new trial. It would seem *permissible* for a trial judge, while the evidence and witnesses are fresh in his memory, to rule on the motion for new trial in the alternative, such ruling not to become effective unless and until the order granting the judgment notwithstanding the verdict shall thereafter be vacated or reversed in the manner provided by law." (Italics ours.)

(3)

In the opinion of the Circuit Court of Appeals it is said "the new rules are not intended to prolong litigation by permitting litigants to try cases piecemeal. Their purpose would not be accomplished if, when relief is asked on condition or in the alternative, the successful party could on reversal go back to the trial court and demand a ruling on his conditional or alternative proposition."

The quotation is tantamount to holding that if a party follows Rule 50 (b) by joining with his motion for judgment notwithstanding the verdict a motion for new trial, he assumes the risk of having his motion for new trial held for naught, although never passed upon by the trial court, in case his motion for judgment notwithstanding the verdict is granted and thereafter the order granting it is reversed. Why a party should be so penalized for following the rule is not apparent. The risk of prolonging litigation would not seem a sufficient reason, since, as indicated by Mr. Simpkins, it is permissible for the trial judge in his discretion to rule on the motion for new trial in the alternative at the same time that he grants the motion for judgment notwithstanding the verdict. If the trial judge declines to follow the suggested practice that is not the fault of the party moving for new trial, since the matter is entirely within the trial judge's discretion.

The trial court evidently took the view that a ruling upon the motion for new trial, after the motion for judgment notwithstanding the verdict had been granted, would have been premature and futile. Under these circumstances, to so construe Rule 50 (b) as to hold that petitioner has lost the right to present to the court the assign-

ments preserved in its motion for new trial simply because the court granted its motion for judgment notwithstanding the verdict is, we respectfully urge, to deny to petitioner substantial justice. Such a construction does not conduce to the accomplishment of the purpose of the new rules. On the contrary, we submit that such an interpretation of Rule 50 (b) is at variance with the spirit and purpose of the rules, and instead of tending to simplify procedure and to protect litigants from its technicalities will have just the reverse effect.

We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

J. Merrick Moore,
Little Rock, Arkansas;

L. E. Oliphant,
Chicago, Illinois,

Counsel for Petitioner.